Supreme Court, U.S.
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NO. 94-____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

THE FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP INDIAN RESERVATION,

Petitioner,

v.

JOSEPH P. MAZUREK, as Attorney General for the State of Montana; and DONALD A. RANSTROM, as County Attorney for Blaine County, Montana,

Respondents

Petition for Writ of Certiorari From An Appeal to The United States Court Of Appeals For The Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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March 15, 1994

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QUESTION PRESENTED

1. Whether a State, under the authority of 18 U.S.C. § 1161, has the jurisdiction to criminally prosecute Indians for violations of state liquor laws occurring within the boundaries of their federally-established Reservations.

LIST OF PARTIES

The Petitioner in this court and plaintiff below is the Fort Belknap Indian Community of the Fort Belknap Indian Reservation.

The Respondents in this Court are Joseph P. Mazuurek, as Attorney General for the State of Montana; and Donald A. Ranstrom, as County Attorney for Blaine County, Montana.

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I. OPINION AND ORDER BELOW

On December 16, 1995, the Ninth Circuit Court of Appeals reversed the judgment of the federal district court for the District of Montana, finding that the State of Montana did have jurisdiction, under 18 U.S.C. § 1161 to criminally prosecute Indians for violations of state liquor laws occurring on Indian reservations. The Ninth Circuit did affirm the holding of the District Court that federal court jurisdiction was present to detemine whether 18 U.S.C. § 1161 granted authority to states to prosecute Indians in state court for alleged on-reservation violations of state liquor laws.

The Ninth Circuit, in reversing the District Court, concluded that although the question of a state's jurisdiction to prosecute Indians in this context is one of first impression, *Rice v. Rehner*, 463 U.S. 713 (1983) provides sufficient guidance to conclude that 18 U.S.C. § 1161 intended to grant criminal jurisdiction to the states. The Order and Opinion of the Ninth Circuit is reproduced in the Appendix at A-1 to A-26. The District Court Opinion on

which summary judgment was founded, is reproduced in the Appendix at A-27 to A-41.

II. JURISDICTION

The Ninth Circuit Court of Appeals entered its order and judgment on December 16, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitutional Provisions

U.S. Constitution. Art. I, § 8, clause 3:

> The Congress shall have Power.....to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.....

Statutes

18 U.S.C.§ 1154:

> Whoever sells, gives away, disposes of, exchanges, or barters any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, except for scientific, sacramental, medicinal or mechanical purposes, ...to any Indian to whom an allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian who is a ward of the Government under charge of any Indian superintendent, or to any Indian, including mixed bloods, over whom the Government, through its

departments, exercises guardianship,.....shall, for the first offense, be fined not more thatn $500 dollars or imprisoned not more than one year, or both; and, for each subsequent offense, be fined not more than five years, or both.

18 U.S.C.§ 1156:

Whoever, except for scientific, sacramental, medicinal or mechanical purposes, possesses intoxicating liquors in Indian country or where introduction is prohibited by treaty or an Act of Congress, shall, for the first offense, be fined not more than $500 or imprisoned not more than one year, or both; and, fo each subsequent offense, be fined not more than $2000 or imprisoned not more than five years, or both.

18 U.S.C. § 1161:

Provisions of 1154, 1156, 3113, 3448, and 3618 of this title shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such

act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of Interior, and published in the Federal Register.

IV. STATEMENT OF THE CASE

In 1974, acting under the authority of 18 U.S.C. § 1161, the Fort Belknap Indian Community Council, the federally recognized governing body of the Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Reservation, adopted an Ordinance opening up their Reservation to the sale of alcoholic beverages. See District Court Opinion, Appendix pp. A-22, A-25. Fourteen years later, the State of Montana sought to prosecute Caroline Brown, an enrolled member of the Community, and her husband, also an Indian, in State court, for possessing and selling alcohol within the boundaries of the Reservation, allegedly without a state license. The State took this action after initially causing an action to be filed in the Fort Belknap Indian Community Tribal Court charging the same offense.

The Fort Belknap Indian Community brought an

action in federal court under 28 U.S.C. §§ 2201, 1331(a), 1362 & 1343, seeking declaratory and injunctive relief against the State of Montana to prevent state criminal prosecution of Indians for actions wholly within the boundaries, and from interfering with tribal court orders regarding property seized in the case under tribal law. The District Court held that the State of Montana did not have the jurisdiction to prosecute Indians for actions within the boundaries, concluding if a violation of state law had taken place, that 18 U.S.C. 1161 would effectively require federal prosecution under 18 U.S.C. §§ 1154 & 1156.

The State appealed this judgment to the Ninth Circuit Court of Appeals. The Ninth Circuit reversed the District Cout, concluding that *Rice v. Rehner*, 463 U.S. 713 (1983) controlled the analysis and provided authority to construe 18 U.S.C. § 1161 as granting states authority to prosecute Indians in State courts for violations of state liquor laws occurring on reservation.

V. REASONS FOR GRANTING THE PETITION

The Ninth Circuit has decided an Important question of federal law which has not been, but should be, settled by this court; Whether a state has the jurisdiction, under 18 U.S.C. § 1161, to prosecute in state court Indians who violate state liquor laws on Indian Reservations.

The authority to govern people and territory, without encroachment of states, is of primary importance to Indian Tribes in preserving their culture and self-government. In *Rice v. Rehner*, 463 U.S. 713 (1983), this court concluded that Tribal interests in regulating alcohol had to be balanced with State interests, and that each had the right to regulate alcohol transactions on reservations, pursuant to 18 U.S.C. § 1161. Id. at 731.

However, this court did not rule on the question of whether such authority to regulate included the right of states to prosecute Indians in state courts for violations of state liquor laws. The plain language of 18 U.S.C. § 1161 provides guidance on this issue:

> "Provisions of 1154, 1156, 3113, 3448, and 3618 of this title shall not apply .....provided such

> act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country....."

Clearly, the criminal sanctions of federal law apply if someone is found to be in violation of state or tribal law. There is no need to 'break new ground' and find that a state can prosecute an Indian for a violation of state liquor laws.

Historically, states have not had jurisdiction to prosecute Indians on reservations. *Seymour v. Superintendent of Washington State Penitentiary,* 368 U.S. 351 (1962). States have prosecuted non-Indians for crimes on reservations in limited circumstances. *Draper vs. United States,* 164 U.S. 240 (1896)

Historically, tribes have had authority to adjudicate matters involving their membership, although this court has found that there has not been a history of prosecuting non-Indians. *Oliphant vs. Suquamish Tribe* , 435 U.S. 191, 208 (1978). Under this rationale, if tribes have no history with prosecuting non-Indians, and therefore have no jurisdiction to prosecute them in their courts, the lack of history of prosecution of Indians by states should foreclose

jurisdiction to do so now.

These principles have been developed by this court, and should be finally decided by this court, especially in this case, on an issue of "first impression".

CONCLUSION

Petitioner respectfully requests this Court issue a writ of certiorari to the Ninth Circuit Court of Appeals for the purpose of reviewing the question presented.

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March 15, 1995

Appendix 1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 93-36086
CT/AG#. CV-89-00215-PGH

THE FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP INDIAN RESERVATION

Plaintiff - Appellee

v.

JOSEPH P. MAZUREK, as Attorney General for the State of Montana; DONALD A. RANSTROM, as County Attorney for Blaine County, Montana

Defendants - Appellants

APPEAL FROM the United States District Court for the District of Montana (Great Falls).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Montana (Great Falls) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED IN PART, REVERSED IN PART.

Filed and entered December 16, 1994.

Appendix 2

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 93-36086
D.C. No. CV-89-00215-PGH

THE FORT BELKNAP INDIAN COMMUNITY
OF THE FORT BELKNAP INDIAN RESERVATION,

Plaintiff - Appellee,

v.

JOSEPH P. MAZUREK, as Attorney General for the State of Montana; DONALD A. RANSTROM, as County Attorney for Blaine County, Montana,

Defendants - Appellants.

Appeal from the United States District Court
for the District of Montana
Paul G. Hatfield, District Judge, Presiding

Argued and Submitted
November 3, 1994-Seattle, Washington

Filed December 16, 1994

Before: Robert R. Beezer and Ferdinand F. Fernandez,
Circuit Judges, and William H. Orrick,*
Senior District Judge.

Opinion by Judge Beezer

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* The Honorable William H. Orrick, Senior United States District judge for the Northern District of California, sitting by designation.

Appendix 3

OPINION

BEEZER, Circuit Judge:

The State of Montana seeks enforcement of its liquor laws on Indian reservations. Joseph Mazurek, in his capacity as Attorney General for the State of Montana ("Montana"), appeals the district court's grant of summary judgment in favor of the Fort Belknap Indian Community of the Fort Belknap Indian Reservation ("Community") in a declaratory judgment action. Montana argues that the district court should have abstained from exercising its jurisdiction. *Younger v. Harris*, 401 U.S. 37 (1971). Montana further argues that the district court erred in holding that it could not enforce its state liquor laws through criminal penalties against tribal members who reside on Indian reservations. We have jurisdiction pursuant to 28 U.S.C. § 1291 and affirm in part and reverse in part.

I

Although the declaratory judgment action brought by the Community was filed in December of 1989, the underlying dispute began almost two years earlier. Caroline and Harley Brown operated a grocery store in Hays,

Montana, within the confines of the Fort Belknap Indian Reservation. Caroline Brown was a Community member. Although Harley Brown was an Indian, the record does not indicate whether he also was a Community member. The Browns sold, among other sundries, beer and wine. In January of 1988, the Blaine County Attorney filed charges against the Browns for possessing and selling liquor without a license.[1] Mont. Code Ann. § 16-6-301(1) (1989).

The Browns moved to dismiss the prosecution, arguing that Montana lacked criminal jurisdiction over Indians for offenses committed on Indian reservations. The Blaine County District court disagreed. The Browns sought immediate review in the Montana Supreme Court, which accepted supervisory control jurisdiction. That court decided that Montana could bring a criminal proceeding in state court against an Indian for violations of the state's liquor laws. *Brown v. District Ct.*, 777 P.2d 877 (Mont. 1989).

The Community then filed a declaratory judgment

[1] The Browns were initially charged in tribal court with violations of tribal liquor ordinances. That court, however, dismissed the charges without prejudice at the request of a Bureau of Indian Affairs investigator who indicated that prosecution would be sought in either state or federal court.

action against the State of Montana in federal district court. *See* 28 U.S.C. § 2201. It accused the state of frustrating "th[e] exercise of tribal sovereignty," the tribe's ability to "exercise reasonable forms of self government," and the ability of the Community "to govern itself." The Community sought a declaration that Montana could not criminally prosecute Indians for liquor law violations on Indian reservations. It also sought permanent injuctive relief to prevent any attempt at enforcing Montana's criminal laws on the Fort Belknap Indian Reservation. Montana moved for summary judgment, arguing that the action was barred by the Eleventh Amendment, and that, in any case, 18 U.S.C. § 1161 permitted it to prosecute Indians for criminal violations of state liquor laws.

The district court granted Montana's motion on Eleventh Amendment grounds, *see Fort Belknap Indian Community v. State of Montana*, 793 F. Supp. 949 (D. Mont. 1992), but stated that it would have ruled in favor of the Community on grounds that the state had no jurisdiction to maintain such prosecutions. The district court provided the Community with time to amend its complaint in order to

avoid the preclusive effect of the Eleventh Amendment. The Community did so, and the district court reversed itself, granting the Community's motion for summary judgment "to the limited extent the community seeks declaratory relief concerning the State of Montana's authority to enforce, through criminal prosecutions, its liquor laws on Indian Reservations." No injuctive relief was ordered.

Montana then moved pursuant to Federal Rule of Civil Procedure 60(b) for relief from judgment on grounds that the district court should have refrained from exercising jurisdiction over the controversy under the *Younger* abstention doctine. The district court denied the motion. Montana appealed.

II

Montana argues that the district court should have dismissed the declaratory judgment action pursuant to *Younger* abstention principles. *Younger v. Harris*, 401 U.S. 37 (1971); *Samuels v. Mackell*, 401 U.S. 66 (1971) (applying *Younger* principles to declaratory judgment actions). It contends that a state criminal proceeding was ongoing against the Browns, and that principles of comity

and federalism should have guided the district court toward noninterference during the pendency of that prosecution. We disagree.

We review *de novo* whether abstention was required under the *Younger* doctrine. *Wiener v. County of San Diego*, 23 F.3d 263, 266 (9th Cir. 1994). In *Younger*, the Supreme Court held that a combination of federal-state comity, federalism, and the limited role for courts of equity "ordinarily require federal courts to abstain from enjoining pending state criminal proceedings." *Bud Antle, Inc. v. Barbosa*, 35 F.3d 1355, 1365 (9th Cir. 1994). *Younger* abstention is appropriate if three criteria are met: (1) state judicial proeedings must be ongoing; (2) the state proceedings must implicate an important state interest; and (3) the state proceedings must offer an adequate opportunity to litigate federal constitiutional issues. *Kenneally v. Lungren*, 967 F.2d 329, 331 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 979 (1993). If these three criteria are met, the

district court must dismiss the action.[2] *Confederated Salish v. Simonich*, 29 F.3d 1398, 1401 (9th Cir. 1994); *Wiener*, 23 F.3d at 266.

In applying the *Younger* test, we adhere to the basic principle that abstention is an "extraordinary and narrow exception" to a district court's role as adjudicator of a ripe controversy. *Barbosa*, 35 F.3d at 1365 (citations omitted). Federal courts have a "virtually unflagging obligation" to exercise the jurisdiction granted them by Congress. *Colorado River Water Conservation Dist. v. United Staes*, 424 U.S. 800, 817 (1976). In a potential abstention case, the Supreme Court says we are "not to find some substantial reason for the *exercise* of federal jurisdiction" but rather to determine if "exceptional" circumstances exist to justify surrender of jurisdiction. *Benavidez v. Eu*, 34 F.3d 825, 831 (9th Cir. 1994) (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25-26

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2 Federal courts have recognized a few limited exceptions to *Younger* abstention. For instance, a federal court should not abstain if the state court action was initiated in bad faith or if the challenged state law is flagrantly and patently unconstitutional. *Lebbos v. Judges of the Super. Ct.*, 883 F.2d 810,814 (9th Cir. 1989). Neither of these exceptions, however, applies here.

(1983)).

The district court offered two grounds for its decision to exercise its jurisdiction and refuse to abstain under *Younger* . First, the court held that the state did not have a vital state interest in asserting criminal jurisdiction over Indians for crimes committed on Indian reservations. Second, the district court determined that abstention was not appropriate because there were different parties in the federal and state action--the Browns in state court and the Community in federal court. Thus, the Community had no opportunity to raise its federal claim in state court. On appeal, Montana contests both of these grounds. We need address only the first.

[1] The Community correctly argues that Montana cannot demonstrate an important state interest. Although there is no question that Montana has a legitimate interest in the enforcement of its liquor laws through criminal prosecution, the primary issue here is whether the state has jurisdiction to prosecute Indians who violate Montana liquor law on an Indian reservation. That question is one of federal jurisdiction.

In *Sycuan Band of Mission Indians v. Roache*, No. 93-55430, 1994 WL 518271, at *5 (9th Cir. Sept 26, 1994), we addressed a similar situation. The Sheriff of San Diego County initiated prosecutions against four Indians for alleged violations of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, which applied state gaming laws to Indian reservation. The Tribe brought an action in federal court for declaratory and injunctive relief, which was granted. The Sheriff argued on appeal that *Younger* abstention was appropriate. We disagreed, finding that the State failed to demonstrate an important state interest. We stated that "the threshold issue of the State's jurisdiction to prosecute is a matter of federal, not state, law." *Roache*, 1994 WL 518271, at *5.[3]

[2] Our analysis is similar here. The threshold

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3 In support of our holding, we relied on a Tenth Circuit opinion that reached the same conslusion. *See Seneca-Cayuga Tribe v. Oklahoma ex rel. Thompson*, 874 F.2d 709 (10th Cir. 1989). In *Seneca*, the court held that, in case where federal jurisdiction was the "central issue [,]...the importance of the State's interest in the state litigation is minimal." *Id.* at 714. The court added that when a state court is asked to decide issues of federal law "in an area in which federal interests predominate, the State's interest in the litigation is in our view not important enough to warrant *Younger* abstention." *Id.*

question in this case is whether Montana has jurisdiction to prosecute Indians in state court for violations of state liquor laws. Although the Supreme Court has already determined that states may regulate liquor transactions on Indian reservations, *see Rice v. Rehner*, 463 U.S. 713 (1983), the question of a state's jurisdiction to prosecute is one of first impression. It is an issue of federal law. The state undoubtedly has an interest in enforcing its liquor laws, but only if federal law gives it jurisdiction to do so for violations that occur on an Indian reservation. Because the jurisdictional question is paramount and federal, *Younger* abstention would not be appropriate here.[4]

III

Montana next argues that the district court erred in holding that the state had no jurisdiction to criminally prosecute Indians for violations of state liquor laws occurring on Indian reservations. Montana relies on *Rice v. Rehner*, 463 U.S. 713 (1983), for the proposition that states have authority to regulate liquor transactions on Indian

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4 Because we agree with the district court that Montana has failed to demonstrate an important state interest, we need not addresss whether Montana met other *Younger* elements.

reservation. Thus, Montana asserts, it must also have the power to enforce its regulations through criminal sanctions for liquor violations. If the state does not have such power, Montana contends, its regulatory authority would be eviscerated.

We review *de novo* the district court's decision granting summary judgment. *Jones v. Union Pac. R.R.*, 968 F.2d 937, 940 (9th Cir. 19920. Questions of statutory interpretations are also reviewed *de novo*. *Squaxin Island Tribe v. State of Washington*, 781 F.2d 715, 718 (9th Cir. 1986).

[3] Two fundamental policy interests clash in this dispute. The state of Montana has an interest in enforcing its liquor laws, if necesssary, through criminal prosecutions. The Community has an interest in self-government and tribal sovereignty; matters that are especially jeopardized when an enrolled Tribal member must appear in state court to face criminal prosecution. Today, we must determine which interest should prevail. Because we believe both federal statutes and case law have struck the balance in favor of the state in the narrow context of liquor laws, we reverse the

district court and hold that Montana may maintain criminal prosectuions of Indians in state court for on-reservation liquor law violations.

State law generally is not applicable to Indian affairs within the territory of an Indian tribe, absent congressional consent. Felix S. Cohen's Handbook of Federal Indian Law 259-60 (1982 ed.) ("Cohen's Handbook"); *see, e.g., United States v. John*, 437 U.S. 634, 651 (1978). In *Rice v. Rehner*, 463 U.S. 713 (1983), the Supreme Court examined whether 18 U.S.C. § 1161 provides as follows:

> The provisions of sections 1154, 1156, 3113, 3488, and 3669, of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian county, certified by the Secretary of the Interior, and published in the Federal Register.

In *Rice*, the Court indicated that Congress, through this statute, intended to permit lifting the federal prohibition against the sale and use of liquor on Indian reservations that had existed since 1832. *Rice*, 463 U.S. at 726-28. Federal statutes prohibiting the selling of liquor on a reservation remained in effect, *see, e.g.*, 18 U.S.C. § 1154, but § 1161

gave Indian Tribes the option to enact tribal ordinances permitting liquor sale and consumption. Any liquor transactions, however, needed to "conform[ ] both with tribal ordinances and state law." *Rice*, 463 U.S. at 728. The tribes in *Rice* had argued that, although state law was to be the benchmark for tribal liquor sales, regulation of liquor was exclusively the province of the federal government and states were preempted from exercising authority in the area. The Court disagreed and said that "[o]ur examination of § 1161 leads us to conclude that Congress authorized, rather than pre-empted, state regulation over Indian liquor transactions." *Id.* at 726.

The Court's holding that states had the authority to regulate liquor on Indian reservations was guided primarily by its analysis of "the role of tribal sovereignty." *Id.* at 719. Historical notions of tribal sovereignty are the "backdrop" against which federal statutes are read in determining whether state laws have been preempted from being enforced on Indian Land. Cohen's Handbook at 274-75; *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 172 (1973). The greater the tradition of tribal independence and self-

government, the more reluctant the Court is to infer that Congress has authorized "the assertion of state authority." *Rice*, 463 U.S. at 719.

The Court concluded, however, that Indians had been divested of any inherent power to regulate in this area, and did not possess "the usual accoutrements of tribal self-government." *Rice*, 463 U.S. at 724 (quoting *McClanahan*, 411 U.S. at 167-68); *see* Cohen's Handbook at 307 ("[c]ontrol of liquor has historically been one of the most comprehensive federal activities in Indian affairs . . . "). The *Rice* Court found that "tradition simply has not recognized a sovereign immunity or inherent authority in favor of liquor regulation by Indians." *Rice*, 463 U.S. at 722; *see Squaxin Tribe*, 781 F.2d at 719 ("tribal sovereignty is not infringed" by state's regulation of tribal liquor sales). The Court determined that it would accord "little if any weight" to asserted interests in tribal sovereignty. *Rice*, 463 U.S. at 725.

The Court recognized that although states generally had little or no power to regulate the affairs of Indians on a reservation, "that assumption woulf be unwarranted in the

narrow context of the regulation of liquor." *Id.* at 723. Distribution of liquor, in the Courts's opinion, had a "significant impact" beyond the boundaries of an Indian reservation. *Id.* at 724. Indeed, the state has "an unquestionable interest in the liquor traffic that occurs within its borders." *Id.* In light of the lack of tribal sovereignty and the high state interest, the Court read § 1161 as delegating part of the federal government's regulatory authority to tribes, *see United States v. Mazurie,* 419 U.S. 544, 554 (1975), and another part to the states. *Rice* 463 U.S. at 731. This dual delegation was consistent, the Court found, with historically "shared concurrent jurisdiction" between the states, tribes, and federal government in this area. *Id.* at 728-290.

Although the Court did not address the question before us today, it did make several references to criminal prosecution in the area of liquor regulation. The Court noted that Congress had historically permitted concurrent state regulation "through the imposition of criminal penalties on those who supply Indians with liquor, or who introduce liquor into Indian country." *Id.* at 726. Later in its opinion,

the Court cited an Interior Department treatise in which "the Solicitor of the Interior Department assumed that § 1161 would result in state prosecutions for failing to have a state license." *Id.* at 732. The Court disapproved of a later Interior Department decision which concluded that states could not prosecute Indians for violations of stae liquor laws. *Id.* at 730 n.13.

The parties have not provided, nor have we found, case law addressing the question of whether *Rice* should be extended to permit state criminal prosecution for violation of state liquor laws on Indian reservations. The Montana Supreme Court found that such an extension was warranted, indeed necessary, in order to enforce a state regulatory scheme. *Brown*, 777 P.2d at 881 ("[i]f we were to interpret 18 U.S.C. § 1161 as permitting only state licensing of liquor transactions on Indian reservations, but not the power to enforce the same, the state would be powerless to effectuate the intent of Congress that such liquor transactions on reservations be 'in conformity with state law.'").

The district court reached the opposite conclusion, limiting *Rice's* holding to the proposition that states may

regulate liquor, but stopping short of allowing states to exercise criminal jurisdiction. The distict court read § 1161 as lifting the previously imposed federal penalties for liquor transactions on Indian reservations only so long as those transactions complied with state liquor laws. The district court found that an act in violation of state liquor laws "necessarily invokes the federal penalties conditionally set aside by section 1161." Thus, the interaction of the federal statutes would never permit state criminal prosection of an Indian for a violation of state liquor laws on an Indian reservation. Either Indians would be complying with state law under § 1161, or Indians would be violating state law, thus dropping out of § 1161 and reverting back to the federal criminal prohibitions contained in 18 U.S.C. § 1154.

[4] In our judgment, the Montana Supreme Court correctly resolved the issue. All of the reasoning of *Rice* indicates that states should have concurrent jurisdiction to bring criminal prosectution in this narrow context. It is true that notions of tribal self-government usually preclude either

criminal or civil jurisdiction of state courts over Indians.[5] Cohen's Handbook at 349. Giving states criminal jurisdiction would concededly be an even more significant infringement on tribal self-government than mere regulation of liquor transactions. The *Rice* court, however, concluded that tribes had no tradition of self-government in the area of liquor due to pervasive federal control. *See* William C. Canby, Jr., *The Status of Indian Tribes in American Law Today*, 62 Wash. L. Rev. 1, 18-19 (1987) (noting that strength of federal regulation operated to deprive tribe of power and "indirectly increases the power of the state to fill the vacuum"). Because of this conclusion, the *Rice* Court found that it was not necessary that Congress expressly indicate that the State had jurisdiction to reulate liquor. *Id.* at 731-33. The same reasoning applies here. Given the unique context of liquor regulation and enforcement, it would not be

5 Of course, some states have asssumed jurisdiction over both criminal and civil mattter on Indian reservation pursuant to Public Law 280, 18 U.S.C. § 1162. These states include California, Minnesota (in part), Nebraska, Oregon (in part), Wisconsin (in part), and Alaska. *See* Cohen's Handbook at 362-72 (reviewing jurisdiction under Public Law 280). Although the *Rice* case arose in California, the Court explicitly relied on § 1161 and not on § 1162. Our holding today neither relies on nor implicates § 1162.

a severe erosion of tribal sovereignty to interpret § 1161 as authorizing the prosecution of Indians in state court for liquor violation on reservations. *See* Canby, *supra*, at 19 (*Rice* dealt with "the unusual subject of liquor regualation").

[5] Section 1161 provides for tribal and state regulation of liquor. The Community contends that the tribe can, and should, prosecute Indians for violations of state law. It follows logically, however, that states should have jurisdiction to prosecute Indians for violation of state law. Montana has the primary interest in the enforcement of its own liquor laws. The power to regulate is a broad power. *See, e.g., Chickasaw Nation v. State of Oklahoma*, 31 F.3d 964 (10th Cir. 1994) (power to regulate under § 1161 can include power to tax). It is broad enought to include the power to enforce state regulation through criminal penalties. Although criminal enforcement is necessarily intrusive, it is one method by which Montana enforces liquor laws. Because jurisdiction is concurrent between the tribe and state, both should be able to begin criminal prosecutions for

violation of their respective laws.[6]

We find the district court's attempt to limit *Rice* unpersuasive because its opinion gave § 1161 an unjustifiably narrow reading. The *Rice* Court broadly found that Indian Tribes have no sovereignty interest and no self-government interest in liquor regulation. The Court further found that congress affirmatively authorized state regulation. The district court's reading of *Rice* would give the states no power at all, but merely allow the federal government to enforce state law. This interpretation of § 1161 was rejected in *Rice*.

Furthermore, the district court's support for its holding that state law was to be a "standard of measurement" to be applied in federal criminal proceedings is not strong. It relies on language from Justice Blackmun's dissent in *Rice* and on language from Cohen's Handbook, which was published before the *Rice* decision. In contrast, the Court in *Rice* indicated that "state laws would apply of their own

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[6] Of course, the federal government also has an interest in enforcing its law, but it has indicated no interest in enforcing individual state's laws. Section 1161 expresses an affirmative grant for states to regulate and no commensurate interest in exclusive federal enforcement.

force to govern tribal liquor transactions." 463 U.S. at 726 Section 1161 is an affirmative grant of power to the states, not merely a standard of federal courts to apply.

The district court's analysis also fails because it would operate to deprive Indian Tribes of jurisdiction to criminally prosecute violations of tribal liquor ordinances. If an Indian did not comply with a tribal liquor ordinance, under the district court's reading of the statutory scheme, § 1161 would not apply and the Indian would be subject only to federal panalties. This system would deprive Indian tribes of their right to enforce their own ordinances, and would amount to a greater loss of tribal self-government and sovereignty than permitting states to criminally prosecute Indians for violations of state law.

We need not address here the scope of federal criminal jurisdiction over Indians for liquor violations.[7] It is enough to recognize that federal jurisdiction to prosecute is not exclusive. Indeed, other federal statutes reveal that the

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7 The Rice court also declined to address the scope of federal criminal jurisdiction because the federal government is similarly not a party, and a determination of its power or jurisdiction beyond the determination that it is not exclusive, is unnecessary.

federal government is capable of making clear its intention to retain exclusive jurisdiction when state laws or issues are involved. *See, e.g.*, 18 U.S.C. § 1153 (Indians are subject to 'exclusive jurisdiction of the United States" for various major crimes committed in Indian country); 18 U.S.C. § 1166(d) ("United States shall have exclusive jurisdiction over criminal prosecutions of violations of state gambling laws that are made applicable under this section to Indian country").

IV

Several additional arguments of the Community require consideration.

The Community argues that *Rice* did not overrule or limit *United States v. Mazurie*, 419 U.S. 544 (1973), which had held that Indian Tribes had been delegated power by § 1161 to regulate liquor transactions. The *Rice* Court later held that states also received comparable delegated power. *Mazurie* does not provide any support for the Community because it did not address the question of criminal enforcement of a state's laws. It involved the power of the federal government to prosecute a non-Indian for a violation

of a tribal ordinance. The Community adds that Congress has the power to supercede state jurisdiction in Indian country. This is, of course, true. Here, however, the statute at issue grants the states such authority.

The Community relies on *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962), for the proposition that states have no jurisdiction to prosecute Indians for offenses which are committed on Indian reservations. *Seymour* is inapposite. It relied on 18 U.S.C. § 1153, which explicitly provided that the United States had "exclusive jurisdiction" over certain crimes committed by Indians against Indians in Indain country. *Id.* at 352 n.2. Here, no such clear congressional intent to reserve federal jurisdiction is present.[8]

The Community also relies on *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), which held

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8 Similarly, our recent opinion in *Sycuan Band of Mission Indians v. Roache*, No. 93-55430, 1994 WL 518271 (9th Cir. Sept. 26, 1994), is of no support to the Community. The statute at issue in that case, the Indian Gaming Regulatory Act, provided that "The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country . . .." 1994 WL 518271, at *2. Thus, the state's lack of criminal jurisdiction was made explicit by Congress.

that tribal courts have no jurisdiction to criminally prosecute non-Indians. The Community argues that the reverse should be true: the state has no jurisdiction to criminally prosecute Indians. In *Oliphant*, however, there was no "congressional authorization"; the tribes merely argued that criminal jurisdiction should "flow[ ] automatically" from their retained inherent powers. *Id.* at 195-96. The Court held that, "absent affirmative delegation of such power by Congress," Indians had no criminal jurisdiction over non-Indians. *Id.* at 208. Here, Montana does not argue, indeed it cannot argue, that it has inherent criminal jurisdiction. States generally have no criminal jurisdiction over Indians for acts committed on Indian reservations. It argues that, in the limited field of liquor enforcement, it has criminal jurisdiction pursuant ot the congressional mandate of 18 U.S.C. § 1161 as interpreted by *Rice v. Rehner*. *Oliphant* does not affect the result here.

The Community further argues that Montana had never before exercised its jurisdiction to criminally prosecute Indians for conduct on Indian reservations. It observes that the tribal courts are available as easy and convenient forums

for prosecution. It further contends that it did not intend to grant jurisdiction to the state to criminally prosecute Indians. These arguments are unavailing. The only question here is whether Montana has the power to bring criminal prosecutions in the narrow context of liquor violations. Whether it has done so in the past or whether prosecution in a tribal forum would be more convenient is irrevelant. Although Montana presumably could agree, and perhaps should agree, to work with tribal courts in prosecuting Indians for violations of state liquor laws, it is not required to do so. Also irrelevant is whether the Tribe intended to cede jurisdiction to the state. Montana has been granted jurisdiction by Congress, thus the Tribe's approval is not necessary.

AFFIRMED in part, REVERSED in part.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

GREAT FALLS DIVISION

NO. CV-89-215-GF

THE FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP INDIAN RESERVATION,)

Plaintiff,)

vs.)

THE STATE OF MONTANA)

Defendant.)

MEMORANDUM AND ORDER

Plaintiff, the Fort Belknap Indian Community ("the Community"), instituted the present declaratory judgment action, pursuant to 28 U.S.C. § § 2201-2202, challenging the State of Montana's authority to prosecute Indian persons for criminal violations of state liquor laws that occur within

Indian country.[9] Having considered the arguments presented by the parties in support of their respective motions for summary judgment, the court is prepared to rule.[10]

BACKGROUND

This matter has its genesis in a criminal proceeding in

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9 Title 18 U.S.C. § 1151 defines "Indian country" as:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

10 The State of Montana, in moving for summary judgment, asserts plaintiff's action is barred by the Eleventh Amendment to the United States Constitution. The state's argument is well taken, given the fact the State of Montana is the sole defendant named in the Community's complaint. see, Kentucky v. Graham, 473 U.S. 159, 167, n. 14 (1985), citing, Alabama v. Pugh, 438 U.S. 781 (1978) (per curiam) ("[u]nless a State has waived its Eleventh Amendment immunity or Congress has overridden it . . . a State cannot be sued directly in its own name regardless of the relief sought."). The Community's argument to the contrary is unpersuasive. see, Blatchford v. Native Village of Noatak, ___ U.S. ___, 115 L. Ed.2d 686 (1991) (Eleventh Amendment precludes suits by Indian tribes against states without their consent). Nevertheless, the court deems it appropriate to enter this memorandum, recognizing the eventual likelihood of the Community amending their complaint to add additional defendants and thereby avoid the preclusive effect of the eleventh amendment.

the District Court of the Seventeenth Judicial District, Blaine County, Montana, charging Caroline Ann Brown and Harley LeRoy Brown with the felony offense of possession and sale of beer and wine without a license in violation of Mont. Code Ann. § 16-6-301(1) (1989). The Browns operated a grocery store in Hays, Montana, within the exterior boundaries of the Fort Belknap Indian Reservation. Caroline Brown is an enrolled member of the Fort Belknap Indian Community and Harley Brown is an Indian person residing within the boundaries of the Fort Belknap Reservation.

The Browns moved to dismiss the action, asserting the State of Montana lacked criminal jurisdiction over Indians for offenses occurring on the reservation. The Browns further moved to suppress certain evidence seized by law enforcement officials during a January 6, 1988, search of their store.[11] The district court denied both motions and the Browns petitioned the Montana Supreme

[11] On January 6, 1988, search warrants for the Browns' store were issued by the Blaine County Justice Court and the Fort Belknap Tribal Court. A search of the Browns' store was effected pursuant to the tribal court warrrant and significant quantities of beer and wine products were seized. The seized goods were subsequently stored at the Blaine County Sheriff's Office.

Court for a writ of supervisory control or other appropriate relief. The court denied the Browns' application for supervisory control, holding, inter alia, a criminal proceeding could be brought in state court for alleged violations of state liquor laws by Indain persons in Indian country. Brown v. District Court, 238 Mont. 248, 777 P.2d 877 (1989).

On November 9, 1989, the Fort Belknap Tribal Court pursuant to motion of the Community, ordered the return of the evidence seized during the search of the Browns' store. The tribal court subsequently issued a writ of assistance commanding the Bureau of Indian Affairs ("BIA") to retrieve the property from the Blaine County Sheriff's Office. In response, the Blaine County Attorney obtained a protective order from the Blaine County district court, providing for the continued retention of the evidence by the Blaine County Sheriff's Office. The protective order also purported to "excuse" all law enforcement officers of Blaine County and officers of the district court from complying with any tribal court order to the contrary.

On December 18, 1989, the Community instituted

the present action, seeking declaratory and injunctive relief as against the State of Montana. The Community asserts the State of Montana, in attempting to enforce state criminal laws within reservation boundaries against enrolled members of federally recognized Indian tribes, has infringed upon the Community's right to self-government. Accordingly, the Community requests, inter alia, an order enjoining the state from attempting to enforce state criminal laws within the reservation boundaries against Indian persons and, furthermore, from interfering with tribal court orders regarding the seized evidence. The Community invokes the jurisdiction of this court pursuant to 28 U.S.C. § § 1331(a), 1362 and 1343.

DISCUSSION

In asserting the authority to enforce its liquor laws within reservation boundaries among tribal members or other Indians, the State of Montana relies on the Supreme Court's decision in Rice v. Rehner, 463 U.S. 713 (1983). In Rice, the operator of a small general store on the Pala Reservation in California appealed a district court decision requiring her to obtain a state license for the retail sale of liquor. The Pala

Band of Mission Indians had adopted an ordinance permitting the sale of intoxicating beverages provided such sales were in conformity with the laws of California. Rehner v. Rice, 678 F.2d 1340, 1342 (9th Cir. 1982), rev'd 463 U.S. 713 (1983).

The Ninth Circuit Court of Appeals reversed the district court, holding a state's regulatory jurisdiction to license liquor transactions or distribute liquor in Indian country was preempted by 18 U.S.C. § 1161.[12] The Supreme Court granted certiorari and reversed the Ninth Circuit, stating, "[O]ur examination of § 1161 leads us to conclude that Congress authorized, rather than preempted, state regulation over Indian liquor transactions." 463 U.S. at 726.

> It is clear then that Congress viewed § 1161 as abolishing federal prohibition, and as legalizing Indian

[12] Section 1161 provides:

> The provisions of sections 1154, 1156, 3113, 3488, and 3618, of this title shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country . . . .
>
> 18 U.S.C. § 1161.

> liquor transactions as long as those transactions conformed both with tribal ordinances and state law. it is also clear that Congress contemplated that its absolute but not exclusive power to regulate Indian liquor transactions would be delagated to the tribes themselves, and to the States, which historically shared concurrent jurisdiction with the Federal Government in this area.

463 U.S. at 728-29.

In additon, the Court noted the presumption that states have no power to regulate the affairs of Indians on reservations was unwarranted in the narrow context of liquor regulation. 463 U.S. at 723.

The Community views Rice as inapposite to the present case. Instead, the Community submits this matter is governed by United States v. Mazurie, 419 U.S. 544 (1975), wherein the Court stated:

> [W]hen Congress delegated its authority to control the introduction of alcoholic beverages into Indian country, it did so to entities which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life. Clearly the distribution and use of intoxicants is just such a matter.

419 U.S. at 557. The Community asserts Mazurie established tribal sovereignty in the area of liquor licensing and distribution, thereby precluding any state regulation in the area and, most assuredly, criminal jurisdiction to prosecute Indian persons.

The Supreme court expressly rejected the interpretation of Mazurie advanced by the Community with respect to states' regulatory jurisdiction. Rice, supra, 463 U.S. at 721. While the Mazurie decision clearly acknowledges the tribes' authority to regulate the possession and sale of alcohol on reservations, it did not abrogate the state's concurrent authority over the same. Rice, 463 U.S. at 733.

> Application of the state licensing scheme does not 'impair a right granted or reserved by federal law.' Kake Village, 369 U.S. at 75. On the contrary, such application of state law is 'specifically authorized . . . by Congress . . . and [does] not interfere with federal policies concerning the reservations." Warren Trading Post Co. v. Arizona Tax Comm'n, 380
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> Id. at 734-35.

The Community alleges Rice is distinguishable because the decision therein was predicated on certain historical findings absent from the present action, namely, the lack of any prior attempts by the State of Montana to regulate the possession and sale of liquor on Indian reservations. The Community's argument is misplaced. The historical findings relied on in Rice did not involve the State of California's attempts to enforce its liquor code on

Indian reservations, but rather the fact that "control of liquor has historically been one of the most comprehensive federal activities in Indian affairs." Rice, 463 U.S. at 722, quoting, F. Cohen, Handbook of Federal Indian Law 307 (1982 ed.).

> The Colonists regulated Indian liquor trading before this nation was formed, and Congress exercised its authority over these transactions as early as 1802 . . . . Congress imposed complete prohibition by 1832, and these prohibitions are still in effect subject to suspension conditioned on compliance with state law and tribal ordinances.

Id. at 722.

Rice clearly established a state's right to regulate the possession and sale of liquor by Indians in Indian country. However, Rice is not dispositive in that the Court did not address the issure presented herein, namely, a state's authority to prosecute Indian persons for violations of state

liquor laws occurring in Indian country.[13] The State of Montana contends Congress would not have provided states the authority to regulate liquor transactions on reservations without the concomitant ability to enforce, through criminal prosecutions, its liquor laws. This court disagrees.

When the Twenty-First Amendment repealed the federal penalties for the sale of liquor, all Indian country remained "dry" by federal law; and for the next twenty years

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13 Rice addressed the limited issue of whether a state liquor license was necessary for the retail sale of liquor on a reservation. In fact, the Court acknowledged its decision did not reach the issue of federal criminal jurisdiction under 18 U.S.C. § 1161. "We also note that it apears the court [Court of Appeals] was interpreting the reach of federal criminal jurisdiction under § 1161 as much as it was deciding the scope of state jurisdiction. In the light of the fact that the Federal Government was not a party below, we do not understand this aspect of the court's holding" 463 U.S. at 734 n.18. Furthermore, the Court could not have addressed the issue presented by the present action given the fact that the State of California exercises general criminal jurisdiction over Indian country, pursuant to 18 U.S.C. § 1162, and may enforce directly any substantive criminal provisions governing liquor sales on Indain reservations. 463 U.S. at 741 n.4 (Blackmun, J., dissenting).

it remained a crime, under 18 U.S.C. § 1154[14] to sell liquor in Indian country. Rehner v. Rice, supra, 678 F.2d at 1352 (Goodwin, J., dissenting). In 1953, Congress enacted 18 U.S.C. § 1161, which allowed Indian tribes to regulate the introduction of liquor into Indian country, provided state law was not violated. Mazurie, supra, 419 U.S. at 547, citing,

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14 Section 1154 provides:

> Whoever sells, gives away, disposes of, exchanges, or barters any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, except for scientific, sacramental, medicinal or mechanical purposes, . . . to any Indian to whom an allotment of land has been made while the titles to the same shall be held in trust by the Government, or to any Indian who is a ward of the Government under charge of any Indian superintendent, or to any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship, . . . shall, for the first offense, be fined not more than $500 dollars or imprisoned not more than one year, or both; and, for each subsequent offense, be fined not more than $2,000 or imprisoned not more than five years, or both.
>
> 18 U.S.C. § 1154

18 U.S.C. § 1161.[15] Congress took care, however, to lift the criminal penalties previously imposed upon liquor traffic with Indians only so long as the newly legalized "transaction" conformed with state laws. Rehner, 678 F.2d at 1352 (Goodwin, J. dissenting), citing 18 U.S.C. § 1161. See also, Rice, 463 U.S. at 722 ("these prohibitions [on Indian liquor trading] are still in effect subject to suspension conditioned on compliance with state laws and tribal ordinances."); Cohen, at 306-307 ("This provision [prohibiting the sale of liquor to an Indian person] is still in the code as part of 18 U.S.C. § 1161 and can be

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15 In 1974, the Fort Belknap Community Council enacted ordinance 3-74, entitled "Ordinance Legalizing the Introduction, Sale, or Possession of Intoxicants", which provides, in part:

> NOW THEREFORE BE IT ORDAINED that the introduction, sale or possession of alcoholic beverages shall be lawful within the Indian country under the jurisdiction of the Fort Belknap Indian Community, provided that such introduction, sale, or possession, is in conformity with the laws of the State of Montana.

Ordinance 3-74 is apparently enforced under Title V, Section 1.81 of the Fort Belknap Tribal Code, which prohibits violations of Tribal law. However, neither side has provided the court a copy of Title V. Section 1.81 and, as a result, the court is unaware of the potential criminal penalties for violation of ordinance 3-74. Furthermore, the court is unaware of whether, historically, the Community has prosecuted Indian persons for violating ordinance 3-74.

conditionallly suspended by enactment of a tribal ordinance pursuant to the latter section.").

The federal statutes prohibiting the sale and possession of liquor in Indian country, namely 18 U.S.C. § § 1154 and 1156,[16] remain in effect despite the enactment of 18 U.S.C. § 1161. See, Mazurie, supra (non-Indians operating a bar without the requisite tribal liquor license were convicted, in federal court, of introducing "spirituous beverages" into Indian country, in violation of 18 U.S.C. § 1154). The federal statutes are suspended, however, by compliance with state liquor laws and tribal ordinances.

Accordingly, state liquor laws must necessarily provide "the standard of measurement to define lawful and unlawful activity on the reservation." Rice, 463 U.S. at 744 n.7 (Blackmun, J., dissenting), quoting, Applicability of the

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16 Section 1156 provides:

> Whoever, except for scientific, sacramental, medicinal or mechanical purposes, possesses intoxicating liquors in Indian country or where introduction is prohibitied by treaty or an Act of Congress, shall, for the first offense, be fined not more than $500 or imprisoned not more than one year, or both; and, for each subsequent offense, be fined not more than $2,000 or imprisoned not more than five years, or both.
>
> 18 U.S.C. § 1156.

Liquor Laws of the State of Montana on the Rocky Boy's Reservation, 78 I.D. 39, 40 (1971). See also Cohen, at 308 ("[S]ection 1161 incorporates state liquor laws as a standard of measurement to define what conduct is lawful or unlawful under federal law . . . ."). Id. at 744 n.8. An act or transaction in violation of either applicable state liquor laws or tribal ordinances necessarily invokes the federal penalties conditionally set aside by section 1161. See, Cohen, at 308. Based on the foregoing analysis, this court concludes that while the State of Montana has the authority, pursuant to 18 U.S.C. § 1161, to regulate liquor transactions in Indian country, the federal government retains criminal jurisdiction to enforce the penalty provisions of 18 U.S.C. § § 1154 and 1156 for violations of state liquor laws.

CONCLUSION

The Community's action against the State of Montana is barred by the Eleventh Amendment to the United States Constitution. Consequently, IT IS HEREBY ORDERED that the State of Montana's motion for summary judgment be, and the same hereby is, GRANTED. The Community's motion for summary judgment is likewise

DENIED. The Community may, however, file an amended complaint in this matter within ten (10) days of the date hereof.

IT IS SO ORDERED.

DATED this 22nd day of April, 1992.

/S/
PAUL G. HATFIELD, CHIEF JUDGE
UNITED STATES DISTRICT COURT